CF0000057433

(2)

Single Bench (Criminal)

IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

Criminal Appeal No. 375 of 1990.

APPELLANT
(In Jail) : Chaitram, son of Maneshwar Kanwar aged about 35 years, resident of village, Pahadludeg, P.S. Lailanga, Distt. Raigarh.

2-4-90
G K Soni
Rec
2-4-90

v e r s u s

RESPONDENT : The State of Madhya Pradesh

CRIMINAL APPEAL UNDER SECTION (374)(378(2)) OF THE Cr.P.C.

(47)

XI-HC-78

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक Cr.A. No. 375/90 **सन् 200**

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

25.01.2007

Shri Hanuman Prasad Agrawal, counsel for the appellant.

State by R.K. Sharma, Panel Lawyer.

Arguments heard.

Oral judgment dictated on Board as follows:

Sunil Kumar Sinha, J.

(1) This appeal is directed against the judgment of conviction and order of sentence dated 2/2/1990 passed by the First Additional Session Judge Raigarh in Sessions Trial No. 141/1989, whereby the appellant has been convicted under Sections 376 & 323 of IPC and sentenced to undergo Rigorous Imprisonment for 7 years and 3 months respectively on each count. The sentences have been directed to run concurrently.

(2) The brief facts are that on 1/7/1989, at about 5 p.m. the prosecutrix namely Supari Bai was all alone in her house. Her husband had gone for grazing cattle (she goats). At that time, the appellant, who was previously known to the prosecutrix, came to her house and asked as to who are in the house? On this, the prosecutrix replied that her husband had gone for grazing cattle (she goats). The appellant caught the hand of the prosecutrix and threw her on the ground and thereafter committed sexual

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -2-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

intercourse against her. Since it was raining on that day the husband of the prosecutrix returned back to the house along with cattle, and on hearing alarm of the prosecutrix he entered in to the house and saw that the appellant was there. On seeing the husband of the prosecutrix, the appellant started running away and he was chased by the husband, on which the accused gave one Lathi blow to the leg of the husband. Thereafter the prosecutrix narrated the story to the husband and she also narrated the story to the village Choukidar Ram Prasad alias Jhankhar. Since it was evening time and was raining, the matter was reported to the police station on the next day i.e. 2/7/1989 and the First Information Report under Ex.P/1 was recorded. The husband of the prosecutrix namely Lokeshwer (P.W.2) was sent for medical examination under requisition Ex. P/2. After his examination a medical report under Ex.P/2-A was prepared by Dr. Shailendra Upadhyay (P.W.3). The prosecutrix was also sent for medical examination to the Primary Health Center, Lailunga, under Ex. P/5, on which after her examination a report under Ex. P/5-A was prepared by Dr. Smt. Asha Pandey (P.W.4). The accused appellant was also sent for medical examination by Ex. P/3 and a report Ex. P/3-A was prepared by Dr. Shailendra Upadhyay (P.W.3).The

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -3-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Saree and Blouse of the prosecutrix were also seized and the same were sent for examination to the Forensic Science Laboratory Sagar and after completion of the investigation, the charge sheet was filed in the Court of CJM, Raigarh who in turn committed the case to the Court Sessions. Raigarh, from where the case record was received on transfer by the First Additional Session Judge Raigarh, who conducted the trial.

(3) In order to establish the guilt of the accused, the prosecution examined as many as 6 witnesses. Thereafter, the examination of the accused was recorded by the Additional Session Judge under Section 313 Cr.P.C., and after hearing the arguments of the parties, the learned A.S.J., by judgment dated 2/2/1990, convicted and sentenced the appellant as aforementioned.

(4) The conviction is based upon the testimony of the prosecutrix Smt. Supari Bai and also on the testimony of her husband Lokeshwer (P.W.2). Learned counsel for the appellant argues that the testimony of the prosecutrix is not reliable so as to warrant conviction under Section 376 IPC and her evidence and conduct would show that a possibility of the prosecutrix being a consenting party cannot be fully ruled out in this case. He also argues that since the husband returned to the house well in

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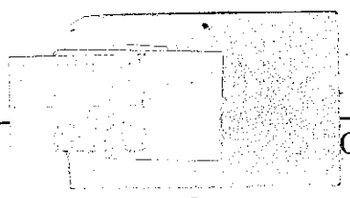
आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -4-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

advance due to rainfall in the said evening and when the prosecutrix could notice that her husband had come and the accused appellant is still present inside the house, she raised an alarm and the matter was reported to the police.

(5) On the other hand learned State counsel opposes the aforesaid arguments advanced by the learned counsel for the appellant and supports judgment of the Sessions Court.

(6) The prosecutrix has deposed in para 1 of her statement that when she was all alone in the house, the appellant came there and inquired about her husband, on her reply that the husband had gone for grazing cattle, he caught hold of her hand and threw her on ground and thereafter he removed her cloths and committed sexual intercourse against her. She has stated that she was not consenting to the said act of the accused and on resistance she had cried and on hearing her cries her husband came there and when the accused saw her husband, he left her and started running and while running away he gave one *lathi* blow to her husband. She has further stated that since it was raining, the report was not lodged immediately and on the next day they had gone to Lailunga police station where the report (Ex.P/1) was lodged. She also stated that her *Saree* and



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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश — 5—	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Blouse was seized by the police and semen stains were present over the *Saree*. She has further stated that she was sent for medical examination to P.H.C., Lailunga, where she was examined by the doctor. If the medical report of the prosecutrix and the evidence of the lady doctor is seen it would appear that on examination of the prosecutrix, the lady doctor has not noticed any external injury on her body. Her hymen was old, ruptured and there were no injuries over perineum and in fact old tags of hymen were seen. She was habitual to the sexual intercourse. The doctor has stated that no definite opinion can be given as to when the last sexual intercourse was done. The husband of the prosecutrix namely Lokeshwer (P.W.2) states that when he was returning back his house, he heard the alarm of his wife and when he rushed inside the room he saw the appellant there, who started running away from his house and when he tried to catch, the accused gave one Lathi blow to him. His wife told him that the appellant has committed sexual intercourse against her will. Vide para 2 of his examination-in-chief, he has stated that this matter was disclosed by her wife to Kotwar of the village namely Ram Prasad alias Jhankhar (P.W.5). He also narrated the story to the Kotwar and has also narrated the same to his father-in-law. Ram Prasad has been examined as P.W.5. He has

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश — 6 —	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

stated vide para 2 of his statement that the prosecutrix along with her husband came to his house and the prosecutrix has stated that some quarrel took place with the appellant and for this the matter is to be reported to the police, on this, he went to the police station on a bicycle and the prosecutrix and her husband also came to the police station on foot. Though he has been declared hostile by the prosecution but he has denied the suggestions, vide para 5, that in fact the prosecutrix had disclosed to him that she was subjected to forcible sexual intercourse by the appellant. He stated that she had disclosed this fact while she was lodging the FIR. He has denied the other suggestions given to him. If we examine the evidence of the prosecutrix and her husband in light of the medical evidence and also in light of the evidence of P.W.5 Ram Prasad, first of all, it has to be noticed that even after throwing the prosecutrix by the accused on the ground, she did not receive any external injury on her body. Not only this, she did not receive any injury even on her private part, when there are allegations of forcible sexual intercourse by the appellant that too on a massive resistance by the prosecutrix. In a normal circumstance, when a grown up lady that too of a labour class is subjected to sexual intercourse and she resisted to the said act, it is quite natural

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -7-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

and reasonable that there would be chances of having some sign of resistance or violence on the body of the lady.

(7) ***Modi in his book of Medical Jurisprudence and Toxicology 23rd addition at page 938 - 939*** while answering medico-legal questions observed that "under ordinary circumstances, it is not possible for a single man to hold sexual intercourse with a healthy adult female in full possession of her senses against her will, unless she is taken unawares, thrown accidentally on the ground and placed in such a position as to render her completely helpless, or unless she faints from fright or exhaustion after a long resistance. The act may be accomplished in a gang rape, if more than one man is concerned with the crime, or if the woman is too feeble to resist. In giving a definite opinion, it is necessary to take into consideration the relative strength of the parties and the community to which the victim belongs. It is obvious that a woman belonging to a labour class, who is accustomed to hard and rough work, will be able to offer a good deal of resistance and to deal blows on her assailant, and will thus succeed in frustrating his attempts at violation. On the contrary, a woman belonging to a middle class or rich family, might not be able to resist for long, and might soon faint or be rendered powerless from fright or exhaustion".

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -8-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

(8) In the present case admittedly the prosecutrix was aged about 26-27 years and she was a lady belonging to labour class. In the normal circumstances, she would be in a position to resist the act of a person aged about 35 years wanting to commit sexual intercourse against her will and if the resistance is true and positive and not merely for the sake of resistance or for the sake of giving a late consent, then certainly some mark of violence should be noticed particularly in the circumstances as are set forth by the prosecutrix in this case, because the prosecutrix says that when the husband of the prosecutrix is not in the house, he caught the hand of the prosecutrix and forcibly threw her on the ground. Secondly the factum of the alarm is important. About the alarm the prosecutrix has mentioned that : "मैं चिल्लाई तो मेरा आदमी आ गया."

In her Court statements, she says that on resistance she made alarm then her husband came over there whereas in the statement of the husband it comes that on hearing the alarm he entered the house. What was the nature of the alarm has not been deposed either by the prosecutrix or by her husband. It is not the case where the prosecutrix or the husband are saying that the prosecutrix was crying for saving her but it only comes in the evidence that there was some alarm from the side of

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -9-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

the prosecutrix on which the husband came inside the house and he noticed the presence of the appellant. Even the husband is not saying that he had seen the prosecutrix in compromising position with the appellant, therefore, it is clear that at least the husband has not seen the prosecutrix lying with the appellant and when he entered the house he only saw that the appellant is present there and in that situation, there was no necessity for the prosecutrix to raise alarm at that stage because, according to her, by that time, the sexual intercourse etc. was already over. This conduct of the prosecutrix clearly indicates that after completion of the sexual intercourse she could any how notice that her husband had returned back well in advance, may be on account of rainfall, and when she saw that he had already reached to the house, and the appellant has not left the house she raised alarm. This conduct of the prosecutrix, supported by the medical evidence, goes to show that a possibility of the prosecutrix being a consenting party, cannot be fully ruled out in this case and in fact the prosecution has utterly failed to prove the charge u/s 376 IPC against the appellant.

(9) So far as the charge under Section 323 IPC is concerned, it has come in the evidence of (P.W.2) Lokeshwer that he has received a Lathi

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश —10—	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

blow by the accused. His above evidence is supported by the medical report dated 2/7/1989 in which pain and tenderness were noticed at the left side of thigh near knees and pain and tenderness were also there on the right elbow. The injuries were stated to be simple in nature by the doctor. This injury report has been proved as Ex. P/2-A by Dr. Shailendra Upadhyay (P.W.3). According to this evidence, certainly the appellant would be guilty for the offence under Section 323 IPC for beating the husband of the prosecutrix namely Lokeshwer (P.W.2) and the said offence is rightly held to be proved against him.

(10) In the result the appeal is partly allowed. The conviction and sentence imposed upon the appellant u/s 376 IPC are set aside. However the conviction and sentence u/s 323 IPC are upheld. It is stated that the appellant has already undergone more than the term of sentence awarded u/s 323 and presently he is in jail on account of committing default against the order of suspension. He be released forthwith if not required in any other offence.

Sd/-
SUNIL KUMAR SINHA
Judge

P.T.O.